

**ON** the 9th day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Thomas F. Richardson on October 15, 1993, came on for oral argument by telephone conference.

**APPEARANCES**

The claimant appeared by his attorney, Harold K. Greenleaf, of Liberal, Kansas. The respondent and insurance carrier, appeared by their attorney, Kerry E. McQueen, of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Kent A. Roth, of Great Bend, Kansas. There were no other appearances.

**RECORD**

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

**STIPULATIONS**

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

**ISSUES**

- (1) Did claimant suffer personal injury by accident arising out of and in the course of his employment from September, 1989 through May 21, 1991?
- (2) Did claimant submit timely written claim?
- (3) Did the respondent receive notice of an accidental injury during the period September, 1989 through May 21, 1991, and if not, was the respondent prejudiced as a result?
- (4) What is the nature and extent of claimant's disability?
- (5) What, if any, temporary total disability is due and owing to the claimant?
- (6) What, if any, medical expenses are due and owing from the respondent for this injury?
- (7) Is claimant entitled to future medical expense?
- (8) Is claimant entitled to unauthorized medical expense?
- (9) Is claimant entitled to vocational rehabilitation training?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(1) Claimant has failed to show by a preponderance of the credible evidence that he suffered personal injury by accident arising out of and in the course of his employment from September, 1989 through May 21, 1989.

Claimant, a kill floor supervisor, worked for National Beef Packing Company for 21 years when in January, 1989, he suffered a sudden traumatic injury to his low back while pulling hides. Subsequent to that injury claimant was referred to Dr. Ralph Bloch, an orthopedic surgeon, in Liberal, Kansas. Dr. Bloch examined claimant on January 17, 1989, and diagnosed a lumbar strain with a possibility of a herniated disc. Claimant was scheduled for a follow-up examination on January 20, 1989 with Dr. Bloch, but failed to return. Claimant did not file a workers compensation claim for this injury. After the injury in January, 1989, and because of his supervisory position claimant was able to greatly limit his job lifting requirements.

Claimant next sought medical treatment with Dr. Neonilo A. Tejano in November, 1989. Claimant advised the doctor he was experiencing back pain but provided no background information as to how the injury occurred. Dr. Tejano was suspicious that claimant had damaged a disc as he was experiencing radiculopathy into his legs. At that time Dr. Tejano recommended claimant undergo a series of tests and further opined claimant may need surgery.

Claimant returned to National Beef Packing Company and advised Ms. Janet Kilgore and Mr. Steve James of Dr. Tejano's recommendations. He was advised by Mr. James and Ms. Kilgore that Dr. Tejano would not be authorized to provide treatment by National Beef Packing Company for this condition.

In January, 1991, claimant again sought treatment with Dr. Tejano for this back condition and turned all the medical bills from this treatment into his health insurance with Blue Cross/Blue Shield. Numerous Blue Cross/Blue Shield documents were placed into evidence indicating claimant described this injury as non work-related. In March, 1991, claimant underwent a two-level fusion at L4,5-L5,S1. As a result of this surgery claimant's condition improved and he was returned to work by Dr. Tejano with the precaution that he lift and bend as tolerated. Under cross-examination Dr. Tejano admitted that the disc herniation suffered by the claimant could have been caused by almost any physical activity which put stress on the claimant's back. During this period of time claimant was actively involved in a private welding shop operated in a building separate from his home. The record was unclear as to how much physical lifting was involved in this welding activity during the time claimant was employed at National Beef Packing Company but the evidence did indicate lifting, bending and stooping was involved. By claimant's own admission he severely limited his lifting at National Beef Packing Company subsequent to January, 1989.

In May, 1991, claimant was terminated from National Beef Packing Company. This termination was not related to claimant's workers compensation claim.

The parties have stipulated claimant's written claim to National Beef Packing Company for these injuries was received on June 4, 1991.

K.S.A. 44-501(a) states in part:

"In proceedings under the workmen's compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 1992 Supp. 44-508(g) states:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Claimant has proven an injury arising out of and in the course of his employment in January, 1989. Claimant has alleged injuries from September, 1989 through May 21, 1991, the date of his termination. There is no evidence in the record indicating that it is more probably true than not true that claimant's employment aggravated, accelerated or intensified the claimant's condition after January, 1989. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

The Appeals Board finds claimant did not suffer an injury arising out of and in the course of his employment, to his low back, for the period September, 1989 through May 21, 1991.

On January 22, 1992, claimant amended his Form E-1 alleging low back and bilateral shoulder injuries. By letter of March 12, 1992, claimant further amended his Form E-1 adding a loss of hearing as an alleged injury suffered while employed at National Beef Packing Company.

A review of the medical evidence shows claimant received treatment in 1984 from Dr. Reese for the shoulder condition but failed to seek any medical care from either Dr. Tejano or Dr. Brown for this problem. Dr. Eyster, who performed an independent medical examination upon the claimant, could not relate the shoulder complaints to claimant's employment at National Beef Packing Company.

The Appeals Board herein finds claimant has failed to show by a preponderance of the credible evidence that he suffered injury to his shoulders arising out of and in the course of his employment during the period September, 1989 through May 21, 1991.

The claimant's final allegation relates to his alleged hearing loss. Claimant testified that he felt he had suffered a hearing loss, but was unable to provide any specific medical evidence supporting same. The only testimony regarding the hearing loss came from

Janet Kilgore, the nurse at National Beef Packing Company. Ms. Kilgore, when presented hearing tests, was unable to testify regarding same or lay any foundation as to the interpretation of the medical evidence. No additional evidence was provided by claimant regarding this alleged hearing loss. Claimant failed to mention this problem to either Dr. Tejano or Dr. Brown.

The Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence that he suffered an injury to his hearing during the period September, 1989 through and including May 21, 1991.

(2) Written claim for an injury in January, 1989 was not timely served upon the employer pursuant to K.S.A. 44-520a.

Written claim need not take on any particular form so long as its purpose is to make claim for workers compensation benefits. Ours v. Lackey, 213 Kan. 72, 515 P.2d 1071 (1973). Whether an instrument is a written claim for compensation and whether such claim is timely filed is a question of fact. Ours v. Lackey, *supra* at 78; Wiethorn v. Safeway Stores, Inc., 16 Kan. App. 2d 188, 194, 820 P.2d 719 (1991). The claimant does not allege written claim to the respondent prior to June 5, 1991. Claimant does allege that the payment of medical bills by Blue Cross/Blue Shield constitute payment of compensation under K.S.A. 44-520a, thus extending the time required for written claim to be submitted in this matter.

K.S.A. 1992 Supp. 44-510(b) states in part:

"If the employer has knowledge of injury and refuses or neglects to reasonably provide the benefits required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director."

In this instance the employer had knowledge of claimant's injury in January, 1989, and did provide medical benefits through Dr. Bloch which claimant, for reasons known only to himself, elected to forego. When claimant sought medical care on his own with Dr. Tejano he was advised by the employer that Dr. Tejano's services were unauthorized at which time claimant elected to process the medical treatment through his private health insurance, Blue Cross/Blue Shield. While the law is clear in Kansas that the furnishing of medical treatment by the employer or insurance carrier is tantamount to the payment of compensation, Dexter v. Wilde Tool Co., 188 Kan. 816, 818, 365 P.2d 1092 (1961), it is also clear that procurement of outside medical treatment by the employee does not constitute payment of compensation by the employer. To so hold would be reading into the act something which is not there and a judicial invasion of the powers conferred upon the legislature by the Constitution. Solorio v. Wilson & Co., 161 Kan. 518, 523, 169 P.2d 822 (1946).

Claimant cites Pike v. Gas Service Co., 223 Kan. 408, 573 P.2d 1055 (1978) as controlling in this matter. In claimant's letter to Judge Richardson of May 17, 1993, claimant alleges Pike states timely written claim under K.S.A. 44-520a may be extended when it appears claimant has been provided payments for medical services through a different insurance program. The cite provided by claimant is incomplete and misleading. The complete cite reads as follows:

"There was evidence that certain hospital and medical expenses incurred by the claimant were paid from proceeds of an insurance policy obtained

through the respondent employer. The policy had been issued incidental to the employment of the claimant. The time for filing a written claim under K.S.A. 44-520a may be extended under certain circumstances when it appears a claimant has been provided with payments for medical services under an insurance plan other than that required by the terms of the worker's compensation act and at the time the payments are made is unaware of his rights under the act." Id. at 410.

The claimant, in omitting the final portion of the last sentence has significantly modified the intent of the court in Pike. There is no indication that claimant was misled or was in any way unaware of his rights under the workers compensation act. In fact, by claimant's own admission, he had been provided medical care through Dr. Bloch and was advised by National Beef Packing Company that the treatment by Dr. Tejano was unauthorized.

Claimant's obtaining of medical benefits through Dr. Tejano, which were clearly unauthorized, does not extend the time to file written claim under K.S.A. 44-520a. The Appeals Board finds the written claim of June 5, 1991, was not filed in a timely fashion and as such no proceedings for compensation shall be maintainable under the workers compensation act in this matter.

The Appeals Board, having concluded that written claim was not filed in a timely fashion under K.S.A. 44-520a, and having further found that claimant failed to establish an injury arising out of and in the course of his employment, for the period September, 1989 through May 21, 1991, has no need to decide any further issues in this case.

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated October 15, 1993, is affirmed in all respects and that an award of compensation, in accordance with the above findings in favor of the claimant, Willis C. Boeck, and against the respondent, National Beef Packing Company, and its insurance carrier, Hartford Accident & Indemnity Company, and the Kansas Workers Compensation Fund, for accidental injuries occurring to the claimant from September, 1989 through May 21, 1991, is hereby denied.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed against the respondent and insurance carrier (40%) and the Kansas Workers Compensation Fund (60%), to be paid as follows:

UNDERWOOD & SHANE	
Preliminary Hearing	\$ 55.30
Transcript of Proceedings	\$ 278.50
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Total	\$ 333.80
 COURT REPORTING SERVICE	
Deposition of Dr. Tejano	\$ 211.60
 UNDERWOOD & SHANE	
Deposition of Konny Ritchie	\$ 87.10
Deposition of Dr. C. Reiff Brown	\$ 188.50
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Total	\$ 275.60
 MAYNARD PETERSON & ASSOCIATES	
Deposition of Dr. Loy	Unknown
 COURT REPORTING SERVICE	
Deposition of Mr. Molski	\$ 204.00
 TRI STATE REPORTING	
Deposition of Janet Kilgore	\$ 132.00
Deposition of Willis C. Boeck	\$ 237.75
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Total	\$ 369.75

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Harold K. Greenleaf, P.O. Box 2827, Liberal, Kansas 67905-2827  
Kerry E. McQueen, P.O. Box 2619, Liberal, Kansas 67905-2619  
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Thomas F. Richardson, Administrative Law Judge  
George Gomez, Director